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In the Supreme Court of the United States

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND,
PETITIONER,

v.

SPHERION CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

RANDALL A. CONSTANTINE
Counsel of Record
MAZURSKY CONSTANTINE LLC
3424 PEACHTREE ROAD
SUITE 2400, MONARCH TOWER
ATLANTA, GA 30326-1118
404.888.8877 (telephone)
404.926.2977 (facsimile)
RConstantine@MCBenefitsLaw.com
Counsel for Respondents

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ARGUMENT

The Government claims that the Question Presented has "divided the courts of appeals" and that certiorari should be granted "to eliminate [this] confusion." USBr.7-8. There is no division among the courts of appeals and no confusion about the law. Far from being "divided," every single federal circuit that has addressed this issue has uniformly agreed with the Fifth Circuit *without dissent*. To have such unanimity in result and reasoning from over two dozen jurists is rare and is a testament to the clarity of this Court's holdings in *Mertens v. Hewitt Associates, Great-West Life & Annuity Insurance Co. v. Knudson,* and *Sereboff v. Mid Atlantic Medical Services, Inc.*

The Government strains to portray a conflict by pointing to a single Seventh Circuit case addressing *restitution*, a case that does not survive *Great-West*. It stretches even further by relying on other pre-*Great-West* decisions that raise a distinct jury trial issue *not* presented in this case and that, in any event, fail to reveal any genuine conflict regarding the money damages remedy Petitioner seeks here. Bare assertions of confusion aside, a grant of certiorari in this case could only confirm (or upset) the uniform application of settled law that has persisted in the courts of appeals for the last six years.

The interpretation the Government advocates here is nothing new. It is only a slight variation of the position the Solicitor General advocated unsuccessfully in *Mertens*, and it has been argued almost verbatim by the Department of Labor in an *amicus* capacity to nearly every circuit. The Government's argument has been soundly rejected,

for good reason. *Mertens* clearly holds that the compensatory money damages sought by Petitioner are not "appropriate equitable relief" available under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) (hereinafter §502(a)(3)) because they were not the type of remedy "typically" available in a court of equity. Moreover, while courts of equity had jurisdiction over actions against trustees for breach of trust, and in such actions could impose surcharge or make-whole relief to redress harm to the trust corpus caused by the trustee's maladministration or self-dealing, this case does not involve a fiduciary breach affecting the assets of a trust (or plan). The Government's argument thus fails both under this Court's precedent and on the facts of this case.

Ultimately, the Government is asking this Court to grant the petition not because the Fifth Circuit's opinion conflicts with the decisions of this Court or other courts (it does not), but because the Government believes the absence of a money-damages remedy for suits against fiduciaries by individual health and welfare plan beneficiaries is unjust. The Government protests that "Congress could not have intended [this result] when it enacted ERISA." USBr.7-8. But even Congress has repeatedly rejected that argument. After *Mertens* and again after *Great-West*, Congress declined invitations to amend §502(a)(3) to provide precisely the sort of monetary relief Petitioner seeks. The Government now appeals to the wrong forum. This Court should not intervene to rewrite the statute in Congress' stead.

I. LOWER COURTS HAVE UNIFORMLY HELD THAT ERISA §502(a)(3) DOES NOT AUTHORIZE THE ACTION AT ISSUE HERE.

The decision below does not "deepen[] an existing conflict among the courts of appeals." USBr.15. None exists. As the Government concedes, and its lengthy string cite reveals, nearly every circuit court has addressed the Question Presented. *Id.* And every circuit considering the issue has "concluded that this Court's cases dictate the conclusion that Section 502(a)(3) does not authorize suits against an ERISA fiduciary for monetary redress of losses caused by a breach of fiduciary duty." *Id.*

The Government's purported conflict consists of a single, eight-year-old case from the Seventh Circuit—decided before *Great-West*. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). As the Government acknowledges, the Seventh Circuit in that case held only that Petitioner was entitled to "the equitable remedy of restitution," *id.* at 592, and, in so holding, relied in part on the since-discredited decision in *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999). *See Pereira v. Farace*, 413 F.3d 330, 339-40 (2d Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006). The Government intimates that the *Bowerman* court may have wrongly "denominated" the remedy as "restitution." USBr.16 n.6. To the extent that is true, it only highlights what many courts have since recognized—*Bowerman* did not survive *Great-West*. *See, e.g., Callery v. U.S. Life Ins. Co. in City of N.Y.*, 392 F.3d 401, 408-09 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005) (noting that courts have "questioned" *Bowerman*'s "continuing validity in light of" *Great-*

West). *McDonald v. Household Int'l, Inc.*, 425 F.3d 424 (7th Cir. 2005), does not resuscitate *Bowerman*; it does not even cite it.

Without any true circuit split on the actual Question Presented, the Government strains to identify some "related" conflict by pointing to Seventh Amendment cases involving the right to a jury trial for claims of fiduciary breach.[1] USBr.16. The purported confusion arises, the Government says, because some courts have concluded that claims for "monetary relief" brought under §502(a)(2) or (a)(3) or in non-ERISA fiduciary breach cases are "equitable" and thus do not confer a right to a jury trial, while others conclude claims are "legal" and therefore entitle parties to a trial by jury.

Of the seven cases purportedly holding that "monetary relief" is equitable in the fiduciary breach context (under ERISA or otherwise), all but one were decided before *Great-West*.[2] The one case that post-dates *Great-West*, *Phelps v. C.T. Enters., Inc.*, 394 F.3d 213 (4th Cir. 2005), stands only for the unobjectionable proposition that a §502(a)(3) claim is "equitable" and does not give rise to a jury trial right. It does not suggest, let alone hold, that money

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[1] At the outset, this is not a conflict "among the courts of appeals." USBr.16. The cases upon which the Government relies largely come from federal district or state courts.

[2] Indeed, two of the cases the Government puts on the other side of the split recognize that the earlier cases are no longer good law. *See Ellis v. Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367, at *3-4 (W.D. Mich. Apr. 2, 2007); *Bona v. Barasch*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003). Intervening Supreme Court authority cannot, of course, create a circuit split.

damages are available under that subsection. *Id.* at 222 n.5.

The Government also fails to note that the types of "monetary relief" at issue in most of these cases were *not* the sort of compensatory damages Petitioner seeks here. *See, e.g., Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994) (restitution); *In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985) (accounting); *Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va.*, 876 F. Supp. 809, 816-17 (E.D. Va. 1995) (injunctive relief and restitution); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 321-22 (E.D.N.Y. 1981) (restitution and accounting); *Uselman v. Uselman*, 464 N.W.2d 130, 137 (Minn. 1990) (reimbursement of trust corpus).

Far from revealing confusion among the courts, this supposed, tangential split further demonstrates that, since this Court clarified the applicable law in *Great-West*, lower courts have faithfully and consistently rejected the position urged by Petitioner and the Government. They have not done so blindly. Participating as *amicus* in nearly every circuit, the Department of Labor made the very same merits arguments, almost verbatim, that the Government advocates here. And after reviewing this Court's decisions in *Mertens*, *Great-West*, and (for the more recent cases) *Sereboff*, every single appellate jurist to decide the issue has rejected the Government's position.

II. THE GOVERNMENT'S MERITS ARGUMENT FAILS UNDER THIS COURT'S PRECEDENTS AND ON THE FACTS OF THIS CASE.

In arguing that the Fifth Circuit (and nearly every other appellate court in this country) got it wrong, the Government largely ignores *Mertens*. The silence is deafening.

The Government's argument has changed little since it was first rejected in *Mertens*. Fifteen years ago, the Government argued that compensatory damages could be recovered against a trustee because "such relief traditionally has been obtained in courts of equity and therefore is, by definition, equitable relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (internal quotation marks and citation omitted); *see also id.* (arguing further that equitable relief includes "whatever relief a court of equity is empowered to provide in the particular case at issue"). This Court flatly rejected the Government's position and concluded that, for purposes of §502(a)(3), "equitable relief" means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256-57 (emphasis in original).

The Government seeks to dispense with *Mertens* in seven short lines by observing that it addressed the liability of a *non-fiduciary*. USBr.9. *Mertens*, however, analyzed the meaning of §502(a)(3) without regard to the non-fiduciary status of the particular defendant in that case. This Court acknowledged that in the days of the divided bench courts of equity could provide make-whole relief for breach of trust by a trustee, but it concluded that Congress did not

intend to define "appropriate equitable relief" so broadly:

> Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under §502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

508 U.S. at 257-58 (footnote omitted). Likewise, this Court's analysis of ERISA's express statutory language demonstrates that the nature of the remedy, not the identity of the parties, is controlling. *Id.* at 258-59.

But even if this Court were to ignore *Mertens* and adopt the Government's analytical approach, it still would not find §502(a)(3) relief available on the undisputed facts of this case. This Court applies a two-prong test to determine whether §502(a)(3) relief is available, examining first the nature of the cause of action and then the remedy sought. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 365 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-14 (2002). Neither prong is satisfied here.

The Government argues that courts of equity had exclusive jurisdiction over causes of action for breach of trust against trustees. USBr.11. But this case involves neither a "trustee" nor a "breach of trust" (as that term was used in the days of the divided bench). Petitioner complains of various alleged breaches of fiduciary duty by Spherion Corporation. USBr.4. Regardless of whether Spherion was a

fiduciary, it indisputably was *not* a trustee, and none of the allegations in this case relate to damage to a trust corpus (or, for that matter, plan assets). The Government could prevail on its own terms only if courts of equity had exclusive jurisdiction over *all* causes of actions against *any* fiduciary. Even the Government does not make that claim.

The Government's position also fails under the second prong. The specific remedy urged by the Government—whether it be characterized as "make-whole relief" or "surcharge"—was not "typically" available in a court of equity where (as here) there is no harm to the trust corpus resulting from a breach of trust by a trustee. [3]

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[3] Without exception, all of the cases and commentaries cited by the Government (USBr.11-14) relate solely to relief in the event of harm to, or self-dealing with, the trust corpus (or by analogy assets of an estate or corporation) by the trustee (or by analogy an executor or corporate director/officer) charged with its care. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) (transferee with knowledge of circumstances rendering transfer breach of trust remains liable for trust corpus); *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983) (Government, assuming control over Indians' property, was liable as trustee for damage to trust corpus); *United States v. Mason*, 412 U.S. 391, 398 (1973) (Government liable for paying doubtful tax claim that improperly diminished value of trust corpus); *Mosser v. Darrow*, 341 U.S. 267 (1951) (trustee allowing self-dealing with corporation's stock liable for resulting profits); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 464 (1939) (court can surcharge trustee for losses to trust corpus); *Kendall v. DeForest*, 101 F. 167, 169 (2d Cir. 1900) (trustee "acted at his peril" by allowing depletion of trust corpus); *Bosworth v. Allen*, 61 N.E. 163, 165 (N.Y. 1901) (corporate officers/directors liable for improper disposition of corporate assets); *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (surcharge for losses from

ERISA codifies that principle by providing for monetary relief for injury to a plan at ERISA §§409 and 502(a)(2), 29 U.S.C. §§1109 and 1132(a)(2). Under those provisions, a fiduciary is "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." This is precisely the make-whole or surcharge remedy urged by the Government—but it is available only to redress harm to the plan itself. Congress' failure to provide for compensatory

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investment of trust corpus); *Appeal of Harrisburg Nat'l Bank*, 84 Pa. 380 (1877) (surcharge against administrator for improperly paying out or negligently losing estate assets); *Marriott v. Kinnersley*, 48 Eng. Rep. 187 (High Ct. Ch. 1830) (trust corpus included insurance policy; trustees failed to preserve trust corpus by discontinuing premium payments and by delivering sale proceeds to co-trustee who became insolvent); Restatement (Third) of Trusts §205 & cmt. a, at 223 (1992) (trustee "chargeable with the amount required to restore the values of the trust estate"); Restatement (Second) of Trusts §205, at 458 (1959) (breaching trustee liable for resulting loss or lost profits to trust corpus); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §862, at 36-39 (rev. 2d ed. 1995) (trustee may be surcharged for loss to trust corpus resulting from various forms of negligence or misconduct); 3 John N. Pomeroy, *A Treatise on Equity Jurisprudence* §1080, at 2481 (4th ed. 1918) ("trustee incurs a personal liability for a breach of trust . . . whenever the trust property has been lost or put beyond [the beneficiary's] reach by the trustee's wrongful act"); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §205, at 238-39 (4th ed. 1987) ("if a breach of trust results in loss to the trust estate, the trustee is chargeable with the amount of the loss"); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§1268-78, at 519-34 (12th ed. 1877) (discussing trustee liability for breach of trust with respect to preservation and care of trust corpus).

monetary relief absent harm to a plan is consistent with the absence of such extraordinary relief in analogous circumstances in traditional courts of equity, and the concept of "appropriate equitable relief" in §502(a)(3) should not be distorted to provide a remedy Congress omitted.

In sum, *Mertens* squarely held that money damages, however denominated, are not the sort of typical equitable relief that is available under §502(a)(3). And even if this Court were to abandon that holding in favor of the Government's species-of-defendant analysis, such relief was available in equity only against trustee (or quasi-trustee) fiduciaries to redress harm to a trust (or quasi-trust) corpus; equity provided no such remedy (and indeed no cause of action) in circumstances analogous to those presented in this case.

III. THE GOVERNMENT SEEKS REDRESS FOR THE PERCEIVED INEQUITIES OF ERISA'S STATUTORY SCHEME FROM THE WRONG FORUM.

Ultimately, the Government urges this Court to grant the petition because it believes the absence of money damages in cases like this one is unfair. The Government appeals to ERISA's broad statutory purpose but forgets this Court's frequent reminder that ERISA is a "carefully crafted and detailed enforcement scheme" that "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 254, 262; *see also Great-West*, 534 U.S. at 209; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

The Government's assertion that "Congress could not have intended" to deprive persons like Petitioner of a "meaningful remedy," USBr.18, rings particularly hollow here. "Vague notions" of ERISA's purpose, *Great-West*, 534 U.S. at 220, cannot withstand the tangible evidence of how Congress has *in fact* reacted to the precise issues the Government perceives. Three weeks after *Mertens* was decided, an amendment to §502(a)(3) was introduced in the Senate to "provide participants and beneficiaries the full economic value of any benefits they would have received absent such violations." Omnibus Budget Reconciliation Act of 1993, S. 1134, 103d Cong. §12312(a). It was never adopted. And three weeks after this Court decided *Great-West*, an amendment was proposed in the House that would have modified §502(a)(3) to provide for "such additional relief as a court of equity might have awarded in a case involving the enforcement or administration of a trust." Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. §403(c). An identical amendment was proposed in the Senate two months later. INFORM Act of 2002, S. 2032, 107th Cong. §403(c). Neither amendment was adopted.

Despite the Government's plea that Congress could not have intended to deprive plaintiffs like Petitioner the equivalent of money damages, in the wake of *Mertens* and *Great-West*, Congress has repeatedly resisted calls to amend §502(a)(3) to provide such relief. To the extent jurists, legal scholars, or the Department of Labor are dissatisfied with ERISA as it stands, their appropriate recourse is a renewed appeal to Congress—not to this Court in Congress' stead. The Government's displeasure

with the law affords no reason to disturb the reasoned judgment of the Fifth Circuit.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RANDALL A. CONSTANTINE
Counsel of Record
MAZURSKY CONSTANTINE LLC
3424 PEACHTREE ROAD
SUITE 2400, MONARCH TOWER
ATLANTA, GA 30326-1118
404.888.8877 (telephone)
404.926.2977 (facsimile)
RConstantine@MCBenefitsLaw.com
Counsel for Respondents